No. 83-57

IN THE

SUPREME COURT OF THE UNITED STATES

Term, 1983

DANA DAVIS,

Petitioner

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

MICHAEL J. VESHECCO, Member
of the Bar of the United States
Supreme Court
and
PAUL J. SUSKO
District Attorney's Office
Room 16, Second Floor
Erie County Court House
Erie, Pennsylvania 16501
(814) 452-3333, Ext. 349

QUESTIONS PRESENTED FOR REVIEW

I. Whether the arresting officer had sufficient probable cause to arrest the petitioner for a felony offense and to seize narcotics from his person pursuant to said arrest?
(Answered in the affirmative by the Court below.)

II. Whether the decision in Gates v. Illinois has any relevance to the facts of this case where the petitioner could have been arrested for a felony offense without a warrant pursuant to Pennsylvania law?
(Not addressed by the Court below.)

III. Whether the decision in Gates v. Illinois should be given perspective application is even at issue in this case?
(Not addressed by the Court below.)

IV. Whether the petitioner received effective assistance of counsel, pursuant

to his Sixth Amendment right, where trial counsel did not oppose consolidation of the charges in one trial where said action constituted a reasonable trial strategy? (Answered in the affirmative by the Court below.)

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STATEMENT OF THE CASE

The respondent essentially agrees with the petitioner's Statement of the Case. However, the respondent sets forth the following facts.

Pennsylvania Rule of Criminal Procedure 101(3) provides:

> "Criminal proceedings in Court cases shall be instituted by:
> ...
> 3. An arrest without a warrant upon probable cause when the offense is a felony...."

Pa.R.Crim.P. 101(3).

Even though the arresting officer possessed an arrest warrant for the petitioner, the officer was empowered pursuant to the Pennsylvania Rules of Criminal Procedure to make a felony arrest, provided he had sufficient probable cause.

The arresting officer had probable cause to believe that the petitioner sold

one quarter pound of marijuana, which is a felony offense in Pennsylvania. See 35 P.C.S.A. §780-113(f) and §780-114.

In addition to the information contained in the probable cause section of the arrest warrant, the arresting officer personally had additional probable cause to arrest the petitioner. The arresting officer testified at the suppression hearing, conducted on October 12, 1978, that prior to obtaining the warrant, he had been involved in the investigation of a separate burglary. One of the burglary suspects was David Wayne Stephenson, who informed the officer that money stolen in the burglary was used to purchase drugs from an unnamed person. To corroborate this information, Stephenson turned over the marijuana to the officer. The officer's further investigation led him to Michael Leonard Swab, Stephenson's cousin, another

suspect in the burglary. Swab named the petitioner as the individual who sold the drugs to Stephenson and to Swab.

SUMMARY OF THE ARGUMENT

Regardless of the sufficiency of the probable cause affidavit and the arrest warrant for the petitioner, the arresting officer personally possessed sufficient probable cause to make a felony arrest of the petitioner pursuant to Pa.R.Crim.P. 101(3). As such, the felony arrest of the petitioner was legal, and the cocaine obtained from the person of the petitioner pursuant to his arrest was properly not suppressed by the Court below.

The decision in Gates v. Illinois, infra, is not applicable to this case because the arresting officer was empowered to make the felony arrest without a warrant.

Whether the holding in Gates v. Illinois, infra, should be given prospective application is not an issue to be decided in this case because the

petitioner's arrest was made pursuant to sufficient probable cause, even though not contained in the arrest warrant.

Petitioner's trial counsel was effective by not opposing consolidation of the charges against the appellant in one trial. Said action was a reasonable trial strategy upon the part of trial counsel, especially in view of the fact that the jury acquitted the petitioner on the charge of the sale of marijuana. Moreover, the two charges were so intertwined that a motion to sever the charges would have been meritless under Pennsylvania law regarding consolidation of criminal charges.

ARGUMENT

I. THE ARREST OF THE PETITIONER WAS MADE PURSUANT TO SUFFICIENT PROBABLE CAUSE PURSUANT TO PENNSYLVANIA LAW ON WARRANTLESS FELONY ARREST, DESPITE THE LACK OF SUFFICIENT PROBABLE CAUSE CONTAINED IN THE ARREST WARRANT ITSELF.

The petitioner claims that the seizure of the cocaine from his pocket pursuant to his arrest for the delivery of marijuana was the illegal fruit of an illegal arrest. An examination of Pennsylvania Felony Arrest Law and the probable cause and the knowledge of the arresting officer demonstrates that the petitioner's arrest was legal, and thus, the seizure of the cocaine from his person pursuant to the arrest was not tainted.

The arresting officer sought to arrest the petitioner for the felony crime of selling one quarter pound of marijuana.

This drug delivery charge is a felony crime under the Pennsylvania Crimes Code. See 35 P.S. §780-113(f) and 780-114.

Because the charge was a felony offense, the arresting officer was empowered to make the arrest without a warrant if he had probable cause to make the arrest. Pa.R.Crim.P. 101(3) provides:

> "Criminal Proceedings in Court cases shall be instituted by:
> ...
> 3. An arrest without a warrant upon probable cause when the offense is a felony..."

Pa.R.Crim.P. 101 (3).

The arresting officer obtained an arrest warrant for the petitioner's arrest, which read in relevant part, as follows:

> "...At 5514 Grubb Road... on or about 20 May, 1978 betw 3 P.M. & 3:30 P.M. (Dana Volkman) that he did sell a controlled substance to-wit: marijuana, qty. of approx. 1 quarter pound (alleged for the sum of $60, then $60 to a David Wayne Stephenson, a white male aged 16 years, witnessed by

> Michael L. Swab). Defendant being the age of 23 years and the recipient being the age of 16." (sic).

In addition to this information, the arresting officer had additional information prior to the time of the arrest, which he did not place in the arrest warrant. The suppression hearing conducted in the petitioner's case revealed the additional information which the arresting officer knew prior to the arrest.

At the suppression hearing, conducted on October 12, 1978, the arresting officer testified that prior to obtaining the arrest warrant, he was involved in the investigation of a separate burglary. David Wayne Stephenson, one of the burglary suspects, told Officer Allen P. Swab, the arresting officer, that the money taken in the burglary was used to purchase drugs from a person that he

would not name. Nonetheless, Stephenson turned over the marijuana to the officer. Officer Swab's further investigation led him to interrogate his cousin, Michael Leonard Swab, another suspect in the same burglary. Michael Swab named the petitioner as the individual who sold drugs to Stephenson and to him.

Thus, even though the source and nature of this information was not provided to the magistrate in obtaining the arrest warrant, Officer Swab possessed this information prior to arresting the petitioner.

The Pennsylvania Supreme Court, in the case of Commonwealth v. Whitson,461 Pa. 101, 334 A.2d 653 (1975), ruled that where the arrest was for a felony offense, the fact that the arrest warrant was defective because the magistrate was not presented with sufficient facts to establish probable cause would not justify reversal where the officer who ordered the arrest had sufficient

facts and circumstances within his personal knowledge to justify a warrantless arrest. See also Commonwealth v. Wiggins, 239 Pa. Super. 256, 361 A.2d 750 (1976).

At the time of the arrest, the arresting officer acted with information given to him by at least one accomplice to the alleged delivery and one eyewitness. It is well settled in Pennsylvania that the uncorroborated confession of an accomplice or the information supplied by an eyewitness who has been identified will supply probable cause for a warrantless arrest. See Commonwealth v. Stokes, 480 Pa. 38, 389 A.2d 74 (1978).

While the arrest warrant at issue was arguably defective, the arrest of the petitioner was made legally because it was executed by the officer who himself had probable cause to arrest the petitioner. It follows that the seizure of the one seventy-fifth of one ounce of cocaine

from the person of the petitioner was legal and that the suppression court properly refused to suppress this evidence.

II. THE DECISION IN GATES V. ILLINOIS IS NOT AT ISSUE IN THIS CASE.

The petitioner advances the argument that the decision in Gates v. Illinois, ____ U.S. ____, ____S.Ct.____, ____ L.Ed.2d ____, 33 Cr.L. 3109 (1983), should apply to search warrants only.

Because the Pennsylvania Superior Court held that the arresting officer had probable cause to arrest the petitioner without a warrant, the petitioner's argument on this issue is meritless. Whether the petitioner's arrest is tested according to the Aguilar-Spinelli standards or to the Gates v. Illinois standards, the arrest was made pursuant to probable cause and was a legal arrest.

III. WHETHER THE DECISION IN GATES V. ILLINOIS SHOULD BE APPLIED PROSPECTIVELY OR RETROACTIVELY IS NOT AT ISSUE IN THIS CASE.

As stated earlier, the decision in Gates v. Illinois is really not at issue in this case. Thus, whether the decision should be applied prospectively or retroactively does not deserve further discussion.

IV. THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL, PURSUANT TO HIS SIXTH AMENDMENT RIGHT, WHERE TRIAL COUNSEL DID NOT OPPOSE CONSOLIDATION OF THE CHARGES IN ONE TRIAL WHERE TO DO SO WOULD BE MERITLESS.

Petitioner argues that his trial counsel was ineffective by not opposing consolidation for trial the separate criminal charges of Possession of Cocaine and the Delivery of Marijuana.

The well-established test in Pennsylvania for determining the effectiveness of trial counsel is whether the course chosen by counsel had some reasonable basis designed to effectuate the client's interests. See Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967). The Pennsylvania test for consolidation of charges for trial at the time of the petitioner's trial was, as follows:

> "Consolidation or separation of indictments is a matter within the sound discretion of the trial judge, whose decision will be reversed only for a clear abuse of discretion or in cases of clear prejudice and injustice to an accused." Commonwealth v. Lasch, 464 Pa. 573, 347 A.2d 690 (1975).

The test was restated by the Pennsylvania Superior Court in Commonwealth v. Jones, 242 Pa. Super. 303, 363 A.2d 1281 (1976), stating that consolidation is not an abuse of discretion if the facts and the elements of the criminal charges are easily separable in the jurors' minds and if the fact of the commission of each crime would be admissible as evidence in a separate trial for the other.

Applying this law to the petitioner's case, it is evident that trial counsel was not ineffective by not opposing the consolidation of the charges facing the petitioner. The facts of the two crimes, selling marijuana and possessing cocaine were relatively

simple and easily separable in the minds of the jurors. The fact that the jury acquitted the petitioner on the marijuana charge would tend to indicate that the jurors were capable of separating the facts. Moreover, the two crimes were so intertwined that the evidence of each crime would have been admissible at a separate trial for the other.

As the Pennsylvania Superior Court concluded below, the trial court did not abuse its discretion in consolidating the charges for trial. As such, petitioner's trial counsel was not ineffective by failing to move for severance of the charges. Such a motion would have been baseless.

Trial counsel followed a reasonable trial strategy by having the charges tried together and obtaining an acquittal on the more serious charges.

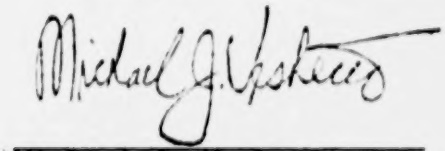
There is absolutely nothing in the record below to indicate that the petitioner's

Sixth Amendment right to effective counsel was violated.

CONCLUSION

Wherefore, for all of the reasons stated above, the Commonwealth of Pennsylvania-Respondent respectfully requests that This Honorable Court deny the petitioner's petition for writ of certiorari to the United States Supreme Court.

Respectfully submitted,



Michael J. Veshecco

and

Paul J. Susko

Attorneys for Respondent